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The Concept of “Cultural Affiliation” in NAGPRA: Potentials and Limits from an International Perspective

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ABSTRACT

In the debate about indigenous cultural property, the Native American Graves Protection and Repatriation Act (NAGPRA) of the United States has developed and implemented an unorthodox concept of “cultural affiliation”. The Act entitles Indian tribes and Native Hawaiian organisations to claim repatriation of their cultural property – comprising human remains, funerary objects, sacred objects and objects of cultural patrimony – upon the establishment of a specific shared group identity and a cultural affiliation to an object. The concept of cultural affiliation in the Act replaces proof of ownership, or proof that an object was stolen or illicitly removed. It thereby amends traditional standards saturated in notions of property and ownership as perpetuated since Roman law, and allows the evolution of a control regime over cultural property that takes into account the cultural aspects of the objects. On an international level, the United Nations Declaration on the Rights of Indigenous Peoples 2007 (UNDRIP) stipulates a similar emancipation of indigenous peoples’ cultural property claims from notions of property and ownership. This paper explores NAGPRA’s cultural affiliation concept as it stands between private property and human rights law. It brings into focus the concept’s elements that go beyond traditional property law. Finally, it looks at the potential and limits of the cultural affiliation concept for implementing UNDRIP’s provisions on indigenous tangible, movable cultural property in other countries.

KEY WORDS

Cultural Property, NAGPRA, Cultural Affiliation, Repatriation, UNDRIP

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**THE CONCEPT OF “CULTURAL AFFILIATION” IN NAGPRA:
POTENTIALS AND LIMITS FROM AN INTERNATIONAL
PERSPECTIVE**

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1. INTRODUCTION

In societies influenced by classical and Justinian Roman law, the legal protection of *proprietas*, *dominium*, or ownership, has developed as the most encompassing right of Man over *res* – the material things of this earth.¹ Legal protection of property in this way was revolutionary at the time and had not existed previously in old Roman law, which treated *res* as integral to the house dominion of the *paterfamilias* over persons. At that time, the common use of *res* for the family, and not a detached economic perspective, determined the value of things.² The development of property under classical and Justinian law into an absolute right uncoupled from the house dominion and factual possession reflected a new economic necessity to regulate an increased exchange of goods and a shift towards a trade-orientated perspective.

In its area of influence, the Roman law principles of private property became established in the following centuries as the leading concept, even though fervently challenged philosophically, sociologically and legally. The ongoing controversy spanned from John Locke's view that property is central for life and liberty,³ to Pierre Joseph Proudhon, who considered that property is equal to theft.⁴

Today, however, private property stands firmly in Western statutory and common law and celebrates the spreading of its extensive trade-friendly dimension throughout the world. The antipodal communist theories of the 19th century aiming at the limitation of private property have failed in practice.

The expansion of private property has also reached developing countries driven by highly influential proponents like the Peruvian economist Hernando de Soto Polar. He evaluated private property not only as the fundamental driving force of the market economy, but also as the most important instrument for development.⁵ The philosophical and religious question "what kind of *res* is or should be accessible for private property", has dissolved into the question "what should be excluded from private property". This question is specifically relevant with regard to cultural property. Roman law excluded such objects from private property as *res extra commercium*. How does and should the law treat such property today?

An important feature of cultural property is its cultural function in a community. It triggers aspects of collective use and collective holding. Collective property being

¹ Max Kaser and Rolf Knütel, *Römisches Privatrecht: Ein Studienbuch*, München: C.H. Beck, 2008, at p. 119; and Reinold C. Noyes, *The Institution of Property: A Study of the Development, Substance and Arrangement of the System of Property in Modern Anglo-American Law*, New York, Toronto: Longmans, Green and Co., 1936, at pp. 131-220.

² Kaser and Knütel, *supra* note 1, at p. 119.

³ John Locke, 'Second Treatise of Government' (1689): John Locke, *Two Treatises of Government*, 7th reprint, London: 1772, at pp. 195-196, 219.

⁴ "Propriété, c'est le vol": Pierre Joseph Proudhon, 'Qu'est-ce que la propriété? ou Recherche sur le principe du Droit et du Gouvernement' (1840), translated and edited by Donald R. Kelley and Bonnie G. Smith (eds), *What is Property*, Cambridge: Cambridge University Press, 1994, at p. 198.

⁵ Hernando de Soto, 'Push Property Rights', *Washington Post* (6 January 2002), available online at http://www.cato.org/pub_display.php?pub_id=5178; Hernando de Soto, 'Why Capitalism Works in the West but Not Elsewhere', *International Herald Tribune* (5 January 2001), available online at http://www.cato.org/pub_display.php?pub_id=5182 (all online sources were accessed 21 September 2011). See also Daron Acemoglu and Simon Johnson, 'Unbundling Institutions' (2005) *The Journal of Political Economy*, 113 (5), pp. 949-995.

ownership or control over things by a group of people has been advocated since Plato as necessary for improving human lives.⁶ Today, such collective property is highly monopolised by modern states. With the exception of the Antarctic, all the territory of the world including air space and open ocean waters and grounds is divided between modern states.⁷ State forming went hand in hand with private property expansion and served colonial powers as legitimising instruments for exploiting land resources in the new worlds to an extent that was unknown to the native peoples.⁸ At the same time, the collective property held by smaller society sections beyond private company law or the law of associations lost protection and declined.⁹ Evolutionists identified collective property as a distinguishing feature between “civilised” and “primitive” peoples,¹⁰ which expanded to the general labelling of collective property as “primitive”. Emile de Laveleye even called the Commons (“Allmend”) in Switzerland, which are still-existing community parcels of land, “primitive property”, due to their communal domain.¹¹ Scholars went so far as to call collective property a deformation of natural law.¹²

It is the constantly growing international indigenous rights movement that brings the relevancy of collective property for smaller, indigenous structures – sometimes also referred to as common property¹³ – into focus again. Indigenous peoples require respect and support for property of collective structures combined with traditional ways of life and beliefs. In 2007, such claims enjoyed important international recognition, when the United Nations General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples¹⁴ (UNDRIP). This Declaration also requires the protection and restitution of indigenous peoples’ cultural property as an essential precondition for their collective well-being.

⁶ Jeremy Waldron, ‘Property and Ownership’, in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy*, Winter 2009 Edition, available at <http://plato.stanford.edu/entries/property>.

⁷ Rüdiger Wolfrum, *Die Internationalisierung staatsfreier Räume: Die Entwicklung einer internationalen Verwaltung für Antarktis, Weltraum, Hohe See und Meeresboden* = The internationalization of common spaces outside national jurisdiction, Habilitationsschrift Bonn, 1980, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, vol. 85, Berlin: Springer, 1984, at p.4.

⁸ Caroline Humphrey and Katherine Verdery, ‘Introduction: Raising Questions about Property’, in Katherine Verdery (ed.), *Property in Question: Value Transformation in the Global Economy*, Wenner-Gren International Symposium Series, Oxford: Berg, 2004, pp. 1–25, at p. 4.

⁹ Ibid., at p. 18. The same process with new beneficiaries such as China is still going on for example in Africa. The reasoning is strikingly similar to colonial times. See for example Li Ping, ‘Hopes and Strains in China’s Oversea Farming Plan’, *The Economic Observer Online (eoo.com)* (3 July 2008).

¹⁰ Humphrey and Verdery, supra note 8, at p. 4, citing Lewis Henry Morgan.

¹¹ Emile De Laveleye, *Primitive property*, translated from the French by G.R.L. Marriott, London: Macmillan and co., 1878.

¹² Humphrey and Verdery, supra note 8, at p. 4.

¹³ See e.g. Theo R. G. van Banning, *The Human Right to Property*, Antwerpen: Intersentia, 2002. This paper uses the term “collective” property as used in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), GA Res. 61/295 (UN Doc. A/61/L.67 and Add.1) (adopted on 13 September 2007), in the preambular text and Article 1. On the difference between collective property and “open access”, see Thraínn Eggertsson, ‘Open Access versus Common Property’, in Terry L. Anderson and Fred S. McChesney (eds), *Property Rights: Cooperation, Conflict, and Law*, Princeton, NJ: Princeton University Press, 2003, pp. 73–89, at pp. 74–76. Eggertsson shows that Garret Hardin’s famous article ‘The Tragedy of the Commons’ (1968) *Science*, 162, pp. 1243–1248, which fiercely questioned “common property”, referred to open access rather than collective property.

¹⁴ UNDRIP, supra note 13.

This paper evaluates the collective interest of indigenous peoples in their movable, tangible cultural property. Such property includes sacred and ceremonial items, artefacts of cultural importance and objects excavated from their graves.¹⁵ The United States enacted legally binding law on Native American cultural property nearly two decades before UNDRIP's adoption of the Native American Graves Protection and Repatriation Act (NAGPRA) of 16 November 1990.¹⁶ This Act stands in property law traditions, but at the same time translates the collective and participatory interests of Native American tribes in their cultural property into United States Federal law. NAGPRA thus leaves the solid ground of property law by applying a revolutionary new "cultural affiliation" concept. In view of the long application period of the Act, NAGPRA may serve as a valuable example and "sparring partner" for other countries, who are willing, or even obliged to strengthen collective property along cultural lines and to implement UNDRIP's provisions on movable, tangible cultural property.

The paper will first outline the limitations of property law principles influenced by Roman law tradition for indigenous cultural property issues (section 2). With the discussion of a scientific theory that goes beyond the principles of property law for indigenous cultural property claims, the paper leads to the cultural affiliation concept of NAGPRA (section 3). It will then look from an international perspective at the cultural affiliation concept as a standard to implement the relevant UNDRIP provisions in other countries. For this reason, it evaluates the factors which helped the concept to succeed in the United States, and the limits which the United States legislator deemed necessary for the concept to be passed (section 4).

2. THE HAMMER AND ANVIL OF PROPERTY LAW

The main feature of property law is the absolute, legally protected dominion of individuals over things. Metaphorically speaking, this can be considered the anvil of property law, as it presents the historical and deeply rooted basis of property law. From classical Roman law onwards, such *dominium*, or *proprietas* has been an a priori unrestricted individual right, indefinite in time, providing absolute power over things.¹⁷ It developed as the legal emancipation from the purely factual possession,¹⁸ and was thus a courageous looking beyond the factual control of a thing into the means by which a thing was acquired.¹⁹ Good title replaced possession as the defining element of the relationship between persons and things. The act of acquisition became the central element of property law and may be compared to the functions of hammers in property law. Hammers acknowledged under Roman law were (1) original appropriation, of which *occupatio* was the oldest form, and (2) derivative acquisition or transfer from

¹⁵ For the purpose of this paper, cultural property will include funerary, ceremonial and sacred objects, objects of cultural patrimony, artefacts and human remains, according to UNDRIP Articles 11 and 12 and 20 U.S.C. § 3001(3) of the Native American Graves Protection and Repatriation Act (NAGPRA), see *infra* note 16.

¹⁶ (1990) Pub. L. No. 101-601, 104 Stat. 3048, codified as amended at (2006) 25 U.S.C. §§ 3001-3013, (2006) 18 U.S.C. § 1170.

¹⁷ Kaser and Knütel, *supra* note 1, at pp. 119, 124; and Noyes, *supra* note 1, at pp. 78-79.

¹⁸ Kaser and Knütel, *supra* note 1, at p. 120.

¹⁹ Sir William Blackstone, 'Commentaries on the Laws of England in Four Books' (1753), reprinted in George Sharswood (ed.), *Commentaries on the Laws of England in Four Books*, vol. 1, Philadelphia: J.B. Lippincott Company, 1893, at p. 393.

another person (the *auctor*). The latter required, in addition to the act of acquisition, the previous right of the *auctor*, as *nemo plus iuris ad alium transferre potest quam ipse habet* (nobody can transfer more than he has himself).²⁰ On the basis of these principles, a claimant could file the *rei vindicatio*, the highly formalised Roman claim of the non-possessing alleged owner against the possessor. The goal of the claim was to (1) determine ownership of the claimant, and (2) to obtain the thing. Defence against such a claim could be successful if the defendant could prove a legitimate act of acquisition with regard to the object, either original or derivative, including proof of good title of any predecessor.²¹ If the obtaining of the thing was not possible, Roman law developed as an alternative the possibility of compensating the owner in money.²² It thereby transformed *res* into financial values, and became an intrinsic part, the iron, of property law.

These Roman law principles, hammer and anvil of property law together with the financial iron, have highly influenced modern property laws. The absolute-right character of ownership, the looking into the act of acquisition for defining legitimate property, and monetary compensation for *res*, are now firm components of property regimes. However, the burning question is whether the property “hammer and anvil” are the appropriate tools for all disputes about any things already emanated under Roman law. Indeed, are all things suitable to be treated with the hammer and anvil of property law? Roman law answered this question with a clear “no”. *Res extra commercium* could explicitly not be subject to the *rei vindicatio* claim. The category of *res extra commercium* included divine (especially sacred and religious) communal or public objects,²³ material which we would classify as “cultural property” today.

Today’s civil law regimes try to follow this tradition of the modern cultural property rationale. For example, the *res extra commercium* exemption of cultural objects from property law directly influenced French jurisdiction when the Cour de cassation decided in 1896 that some miniatures stolen from a public municipal library were public property and not subject to the rules of private commerce.²⁴ Italy explicitly defines a public domain for *res extra commercium* in its Civil Code which includes culturally valuable objects such as “immovables” of special importance and museum collections.²⁵ In Switzerland, the Swiss Federal Act on the International Transfer of Cultural Property (CPTA) of 1 June 2005 established the legal foundation for *res extra commercium* cultural property, provided that the items are of specific importance to the cultural heritage and listed in the Federal cultural property register (Article 3). At the cantonal level, several laws additionally exclude listed cultural property from private commerce as *res extra commercium*.²⁶

Prima facie, such laws free cultural objects from private property principles. At the same time, however, they deliver the objects into a regulatory vacuum, which raises

²⁰ Kaser and Knütel, *supra* note 1, at p. 129.

²¹ *Ibid.*, at pp. 144–145.

²² *Ibid.*, at p. 145.

²³ *Ibid.*, at pp. 104–105.

²⁴ Cour de cassation 17 June 1896 (Jean Bonnin c. Villes de Mâcon et de Lyon), cited by Kurt Siehr, ‘International Art Trade and the Law’ (1993) *Recueil des cours / Académie de Droit International; Collected courses of the Hague Academy of International Law*, 243 (6), pp. 9–292, at p. 64.

²⁵ Article 822(2) cited by *ibid.*, at p. 65.

²⁶ See for an overview on such cantonal law Marc Weber, *Unveräußerliches Kulturgut im nationalen und internationalen Rechtsverkehr*, Schriften zum Kulturgüterschutz, Berlin: de Gruyter, 2002, at pp. 20–23.

difficult questions. If the vacuum is not otherwise filled, for example, with clerical rules for sacred objects,²⁷ should the state have free choice to decide upon such public domain? Is the public domain a static area, or should the objects be able to enter the realm of property law through commodification again? Civil law countries resolve the question by bringing cultural property back into a legal property protection regime through *ex lege* ownership clauses on behalf of the state, combined with principles of inalienability and timeless exemption from prescription or bona fides acquisition.²⁸ The international cultural property law, which was established to better protect the *res extra commercium* status of cultural property, also fails to go beyond hammer and anvil thinking. It requires the establishment of enforcement instruments together with import and export control mechanisms to flank state ownership of cultural property,²⁹ and gives specific treatment to wartime plundered³⁰ or stolen objects.³¹ The focus lies on the absolute property right of states and specific illegitimate acts of acquisition. Discussions turn on the questions of who should have absolute property rights over an object and how the cultural property was acquired. Financial compensation serves as the ultimate "sheet anchor" for protecting private or state property cultural objects, thereby carburising the iron composition of the objects.

Adequate solutions for cultural property disputes and law, specifically with regard to indigenous cultural property, would require thinking beyond the hammer and anvil of property law. Whereas the old, codified civil property laws leave little space to do so, the common law tradition in Anglo-American property law provides more room and flexibility. It allowed cultural property to become the "fourth estate" of property law, forming its own separate category next to real property, intellectual property and personal property.³² There have been critical voices from several directions, including those protecting the marketplace of goods, the cultural commons, or cosmopolitanism,

²⁷ See on clerical rules of *res sacra*, Amalie Weidner, *Kulturgüter als res extra commercium im internationalen Sachenrecht*, Schriften zum Kulturgüterschutz, Berlin: de Gruyter, 2001, at pp. 21-24; and Weber, supra note 26, at pp. 198-214.

²⁸ Weidner, supra note 27, at pp. 95-96.

²⁹ On such instruments, see Siehr, supra note 24, at pp. 132-146 and 162-232. The most important international instrument on this thinking is the UNESCO, Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 823 UNTS 231 (adopted on 14 November 1970, entered into force 24 April 1972).

³⁰ Articles 23, 28, 46, 47 and 56 of The Hague Conventions on Land Warfare of 1899 (adopted on 29 July 1899, entered into force 4 September 1900) and 1907 (adopted on 18 October 1907, entered into force 26 January 1910). The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 (adopted on 14 May 1954, entered into force 7 August 1956); and The Hague Protocol for the Protection of Cultural Property in the Event of Armed Conflict of 1954, specifically Article I(3) of the Protocol.

³¹ For an overview, see Siehr, supra note 24, at pp. 56-107. On an international level the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, 34 ILM 1322 (adopted on 24 June 1995, entered into force 1 July 1998), specifically concentrates on "stolen" objects. In the United States, courts have started to qualify cultural property that has been transferred in violation of legal ownership clauses on behalf of foreign states as being "stolen" according to the National Stolen Property Act on illicitly exported archaeological cultural property. *United States v Hollinshead* (1974) 495 F 2d 1154 (9th Cir); *United States v McClain* (1977) 545 F 2d 988 (5th Cir), (1979) 593 F 2d 658 (5th Cir); *United States v Pre-Columbian Artifacts and the Republic of Guatemala* (1993) 845 F Supp 544 (ND Ill); *United States v Schultz* (2002) 178 F Supp 2d 445 (SDNY), (2003) 333 F 3d 393 (2d Cir), (2004) 157 L Ed 2d 891 (cert. denied).

³² Kristen A. Carpenter, Sonia K. Katyal and Angela R. Riley, 'In Defense of Property' (2009) *The Yale Law Journal*, 118, pp. 1022-1125, at p. 1032.

on the new category and its regulations.³³ However, the idea of treating cultural property separately has allowed the development of new theories that clearly go beyond hammer and anvil property thinking.

For indigenous cultural property in particular, an important reference is UNDRIP, which will be discussed later. An interesting scientific model has been developed by Carpenter, Katyal and Riley.³⁴ The different worldviews of indigenous peoples stimulated the three authors to root their concept in a relational vision of cultural property by emphasising (1) human and social values beyond wealth-maximisation purposes,³⁵ (2) the fluidity and dynamic character of property instead of the mainly stabilising forces of property law³⁶, and (3) the group interest in cultural property other than the one of nation states.³⁷ The ultimate outcome of the theory is a proposal that stewardship becomes the ruling concept for cultural property, amending property law definitions of ownership.³⁸ The starting point for the theory is the shift in emphasis from the absolute right over property, to the view of property as a bundle of relative entitlements. To define such entitlements with regard to indigenous cultural property, the authors look at the indigenous peoples' rights, interests, and obligations and come to the conclusion that their language for describing the relationship between persons and objects should rather focus on obligations of custody, care and trusteeship than on rights, entitlements, or dominion over things.³⁹ In comparing the necessity of stewardship duties with the situation of corporate management and environment protection, the authors suggest that the fiduciary duties of indigenous peoples vis-à-vis their cultural property should be bound up with the web of interests in their cultural property independent of any ownership status.⁴⁰

³³ Ibid., at pp. 1039–1046, referring to the opinions of Eric A. Posner, Michael F. Brown, Naomi Mezey and Kwame Anthony Appiah.

³⁴ Ibid.

³⁵ The authors argue that the ultimate aim of legal protections should be to further Margaret Jane Radin's concept of "human flourishing" by linking property and personhood as an alternative or complement to wealth-maximisation rhetoric. Ibid., at pp. 1046–1047, referring to Margaret J. Radin, *Reinterpreting Property*, Chicago: University of Chicago Press, 1993; Margaret J. Radin, *Contested Commodities*, Cambridge Mass.: Harvard University Press, 1996; and several of her articles.

³⁶ With regard to indigenous peoples' cultural property the authors make a distinction between property which may be used for development and trade (dynamic stewardship), and property that needs to be kept away from the market in order to ensure proper use of cultural objects (static stewardship); Carpenter et al., supra note 32, at pp. 1083–1087.

³⁷ Ibid., at pp. 1027–1028.

³⁸ Ibid., at pp. 1028 and 1050–1065. "It is for the continuance of the tribe, its norms, values, and way of life, that Indian people bring their claims for ongoing access to sacred sites or other cultural resources – and not solely for their personal fulfilment." Ibid., at p. 1051.

³⁹ Ibid., at pp. 1065–1067. The primary goal in indigenous worldviews is the avoidance of disturbing spirits in animate things, rather than making maximum possible use of them for their material benefit; Duane Champagne, 'Indigenous Self-government, Cultural Heritage, and International Trade: A Sociological Perspective', *International Trade in Indigenous Cultural Heritage*, i-call Exploratory Workshop (University of Lucerne, Switzerland, 17–19 January 2011).

⁴⁰ Carpenter et al., supra note 32, at p. 1074.

3. NAGPRA

3.1 THE CULTURAL AFFILIATION CONCEPT

The new property approach along cultural lines of indigenous communities, as set forth in UNDRIP and the theory outlined above, has a predecessor in the legal reality of the United States: the Native American Graves Protection and Repatriation Act (NAGPRA) of the United States enacted on 16 November 1990.⁴¹ This law sets up an unorthodox process to allocate old and newly excavated Native American human remains, funerary objects, sacred objects and objects of cultural patrimony. The revolutionary key feature of this process is the application of a "cultural affiliation" prong, which applies independently of any hammer and anvil property thinking. It gives the notion of culture a new, directly applicable and enforceable legal value, and downplays the financial value of the objects.

To establish cultural affiliation, NAGPRA first requires evidence of an ongoing relationship between a present-day Indian tribe or Native Hawaiian organisation and an identifiable earlier group. The Regulations, which further implement NAGPRA, specify this relationship by requiring the following:⁴²

- 1) Existence of an identifiable present-day Indian tribe or Native Hawaiian organisation;
- 2) Evidence of the existence of an identifiable earlier group;
- 3) Evidence of shared group identity between the present-day tribe or organisation with the identifiable earlier group.

Thereafter, the affiliation of the group or specific members of that group and the objects has to be evaluated.⁴³ For the final allocation of objects within the group, lineal descendants of the deceased, in the case of human remains and funerary objects, and the original holders of objects, in the case of cultural items, take precedence over tribes and organisations.⁴⁴ Ultimately, cultural affiliation decides which person or group of persons shall be the owner, possessor, or steward of an object, resulting in repatriation if necessary.

The cultural affiliation prong abandons the language of property and works with a language which emphasises personal relations and interrelations with regard to an object. It takes into account that the colonial private-property regime was superimposed on Native American cultural property,⁴⁵ of which the possession and use was formerly tied in with complex social and spiritual linkages between peoples and their surrounding world "through ties that did not have an abstract existence but were activated within social gatherings and rituals".⁴⁶ The idea that cultural property may be accessible for private property reconceptualised Native Americans' relationships to cultural practices within changing social and spiritual bonds. Through the cultural

⁴¹ See *supra* note 16.

⁴² 43 C.F.R. § 10.14(c).

⁴³ 25 U.S.C. § 3001(2); 43 C.F.R. § 10.2(d)(1), 10.2(e) and 10.14.

⁴⁴ 25 U.S.C. § 3002(a)(1) and (2); 25 U.S.C. § 3005(a)(1) and (2).

⁴⁵ Carpenter et al., *supra* note 32, at p. 1048.

⁴⁶ Humphrey and Verdery, *supra* note 8, at p. 17.

affiliation component, NAGPRA allows a redevelopment of Native American traditional relations and ties, and loosens the tight private property language and thinking.

NAGPRA takes the prevalence of cultural interrelations over hammer and anvil principles even further, as it amends Western legal criteria of procedural proof for cultural affiliation. It additionally acknowledges “oral tradition”, or “hearsay” as evidence for cultural affiliation, alongside geographical, kinship, biological, archaeological, anthropological, linguistic, folklore, and historical information or expert opinion.⁴⁷ It also refrains from requiring actual “proof” or “scientific certainty” of cultural affiliation, but only looks for a preponderance of evidence.⁴⁸ This again goes in line with indigenous views, like their customs and rules, inter alia with regard to property and cultural objects, mainly based upon oral traditions passed down from generation to generation.

For Western private property minds, the resolving of “ownership” questions based on hearsay stories about cultural relationship is a challenge. This may be illustrated by a NAGPRA case regarding three painted Native American shields.



Mr Pectol and daughters Golda and Devona hold the three Buffalo shields – Photo courtesy of BYU Museum of Peoples and Cultures. Available online at www.entradainstitute.org/local_history_2.htm.

The Pectol Shields, named after their finder’s family name, were in the possession of the Capital Reef National Park in south-central Utah, when NAGPRA required the Park to re-allocate and possibly repatriate the Shields to the Native Americans. Several archaeological expert opinions, consultations with Native American tribes, and the radiocarbon dating of the Shields, left the cultural affiliation of the Shields unresolved. They were unique in the anthropological records and too little was known about the various Native American groups in the area during the period of the Shields’ manufacture around 300-400 years previously.⁴⁹ The Navajo singer or medicine man John Holiday finally provided the necessary “evidence”, by telling the most convincing hearsay story. He remembered that a Navajo man called Many Goats White Hair had

⁴⁷ 43 C.F.R. § 10.14(e).

⁴⁸ 43 C.F.R. § 10.14(f). See also Steven J. Gunn, ‘The Native American Graves Protection and Repatriation Act at Twenty: Reaching the Limits of our National Consensus’ (2010) *William Mitchell Law Review*, 36 (2), pp. 503–532, at p. 528 referring to ‘Providing for the Protection of Native American Graves and the Repatriation of Native American Remains and Cultural Patrimony’, Senate Report No. 473 (1990), at p. 10, available online at <http://rla.unc.edu/saa/repatriation/legislative/lgm002.html>.

⁴⁹ Debora L. Threedy, ‘Claiming the Shields: Law, Anthropology, and the Role of Storytelling in a NAGPRA Repatriation Case Study’ (2009) *Journal of Land, Resources & Environmental Law*, 29, pp. 91–119, at pp. 100–101.

created the Shields nine generations previously as sacred ceremonial objects. In the 1860s, when the United States Army rounded up about half of the Navajo tribe and drove them to Fort Sumner in New Mexico, two other Navajo men, Man Called Rope and Little Bitter Water Person, were concerned about the Shields' safety. They hid them in an area which the Navajos call the Mountain With No Name and Mountain With White Face. This story was the reason why the Shields were ultimately repatriated to the Navajo nation. John Holiday's story was convincing because he could identify Man Called Rope as his grandfather and because Navajos and anthropologists alike considered John Holiday as a highly respected man of impeccable integrity.⁵⁰

This story is far from the notion of Western ownership proof. Nevertheless, the experience with NAGPRA shows that native oral histories and traditions have become highly important and carry a lot of weight in the decisions of scientists, museums, and agencies about the treatment and transfer of Native American cultural property. They became invaluable as a source for testable hypotheses even relating to prehistoric times. Steven J. Gunn counted at least 308 cases, in which oral histories and oral traditions played a role in determining cultural affiliation.⁵¹ It is thus an important instrument for making NAGPRA and its cultural affiliation work.

Since its enactment in 1990, NAGPRA's "cultural affiliation" concept has encountered only two major limitations. Both concern specifically the allocation of human remains. The first one is the question of whether and how the cultural affiliation prong applies in defining an object as "Native American" in the sense of NAGPRA. In a famous case about a 9000-year-old skeleton, called the Kennwick man, district and appellate courts designated the limits of the cultural affiliation concept. They held that the Kennwick man's bones had "no special and significant genetic or cultural relationship to [a] presently existing indigenous tribe, people, or culture" and were thus not subject to the protection of NAGPRA.⁵² In addition, they held that oral traditions could not bridge the period between the time when the Kennwick man lived and the present day.⁵³ However, the courts left it for practice to define from what time period very old objects qualify as Native American. The second big issue on cultural affiliation was resolved by an amendment to the NAGPRA Regulations, adopted in March 2010. Federal agencies and museums did not know how to proceed with human remains and associated funerary objects previously determined to be Native American, but for which no lineal descendant or culturally affiliated Indian tribe or Native Hawaiian organisation could be identified. The amendment to the Regulations on culturally unidentifiable human remains now determines that it shall be left to the Native American tribes to identify the culturally affiliated tribe where the human remains shall be possibly repatriated.⁵⁴ Scholars expect that the Regulations will lead to a tectonic shift in the balance of power between museums and indigenous groups, and that museums

⁵⁰ Ibid., at p. 110.

⁵¹ Gunn, *supra* note 48, at p. 528.

⁵² *Bonnichsen v United States* (2004) 367 F 3d (9th Cir), at p. 879. See for the decision of the District Court of Oregon (2002) 217 F Supp 2d 1116, 1152-55 (D Or).

⁵³ *Bonnichsen v United States* (2004), *supra* note 52, at pp. 881-882, 879.

⁵⁴ 43 C.F.R. § 10.11.

are likely to challenge the Regulations in court as exceeding the scope of allowable administrative action under NAGPRA.⁵⁵

3.2 NAGPRA AND PROPERTY LAW

When looking at NAGPRA's cultural affiliation concept, one must be aware that it forms part of a property act that is principally rooted in the hammer and anvil property thinking. To gain a broader picture of how the cultural affiliation concept is embedded in the Act, one has to recall that the Act regulates two major issues. It first resolves the question of how Federal agencies and museums should treat Native American cultural property kept in their collections. NAGPRA answers this question by obliging Federal agencies and museums to inventory Native American human remains, summarise cultural items and thereafter repatriate them to culturally affiliated Native Americans or Native Hawaiian organisations if possible, requested and not legally prevented.⁵⁶ The second central section in NAGPRA regulates the allocation of Native American archaeological items newly excavated or discovered on Federal or tribal lands after NAGPRA's enactment (16 November 1990). NAGPRA makes clear that ownership or control of such items should be allocated to the Native Americans or Native Hawaiian organisations.⁵⁷

The first section on repatriation is based on a general assumption on behalf of the Native Americans. At the very beginning stands the assumption that transactions with Native American cultural property were generally deficient and that culturally affiliated persons or groups remained the rightful owners of Native American objects, despite any transfer and until proven otherwise. This is one of the consequences which NAGPRA took from the insight that in the past a significant amount of Native American cultural property "was acquired through illegitimate means".⁵⁸ It reflects a study on Native American cultural property mandated by the American Indian Religious Freedom Act of 1978,⁵⁹ which concluded regarding Native American cultural property: "Most sacred objects were stolen from their original owners. In other cases, religious property was converted and sold by Native people who did not have ownership or title to the sacred object."⁶⁰

In order to re-balance this assumption, NAGPRA contains a possibility for a party that is not willing to repatriate an object, to prove a "right of possession" of the object.⁶¹ This leans towards ownership, but is not. NAGPRA defines the right of possession as "the possession obtained with the voluntary consent of an individual or group that had authority of alienation."⁶² NAGPRA considers the act of acquisition, and thus the

⁵⁵ Carole Goldberg, 'A U.S. Perspective on Protection of Indigenous Cultural Knowledge and Heritage', *International Trade in Indigenous Cultural Heritage*, i-call Exploratory Workshop (University of Lucerne, Switzerland, 17-19 January 2011).

⁵⁶ 25 U.S.C. § 3005.

⁵⁷ 25 U.S.C. § 3002.

⁵⁸ Jack F. Trope and Walter R. Echo-Hawk, 'The Native American Graves Protection and Repatriation Act: Background and Legislative History' (1992) *Arizona State Law Journal*, 24, pp. 35-76, at p. 44.

⁵⁹ 42 U.S.C. § 1996.

⁶⁰ Trope and Echo-Hawk, *supra* note 58, at p. 44, citing the American Indian Religious Freedom Act Report 77, August 1979, by the Secretary of the Interior Federal Agencies Task Force.

⁶¹ 25 U.S.C. § 3005(c).

⁶² 25 U.S.C. § 3001(13).

hammer of property law in order to allocate an object. However, the view of this act of acquisition is an exceptional one, as it first asks about the alienability of an object in the application of Native American customs, before it looks at the transaction itself. It thereby allows the Native Americans to qualify an object as *res extra commercium*, before the acquisition of good title by transfer may be considered.

Another element in NAGPRA's repatriation section seems to turn a conflict about Native American property into a more or less conventional property dispute. It is the possibility that Native Americans may file a repatriation claim for their sacred objects and objects of cultural patrimony based upon previous "ownership" or "control".⁶³ This option forms an alternative to the repatriation claim based upon cultural affiliation.⁶⁴ It emphasises the property character of the objects by asking for "ownership". However, it again weakens such claim on absolute property rights by allowing evidence of previous "control" over an object instead. The use of the non-technical term "control" opens an unexplored avenue of interpretation and seems to add factual possession as an alternative to ownership.⁶⁵ Even this property claim in NAGPRA is thus a differentiated property claim if compared to a regular ownership claim.

The NAGPRA section on newly excavated and discovered archaeological items uses property law terms when defining "[T]he ownership or control" of such items.⁶⁶ Similar to states' ownership of cultural property found on state territory, NAGPRA stipulates that the Native Americans shall be the "owners" or "controllers" of objects found on Federal or tribal lands. However, NAGPRA goes on to fill the ownership term with a list that defines the persons and tribes who shall receive the objects. It starts with the lineal descendants as the prioritised owners of human remains and associated funerary objects,⁶⁷ followed by the tribal landowners for receiving unassociated funerary objects, sacred objects, and objects of cultural patrimony.⁶⁸ The last ones in the priority list are the culturally affiliated tribes, or tribes with aboriginal land occupation, or with any other strong cultural relationship.⁶⁹ The property relevance of this ownership system is unique and difficult to assess within the cultural property system. Despite its property context, it deviates, as a new allocation system, from basic private property finders' law principles.

As can be seen from these provisions, NAGPRA mixes the cultural affiliation concept with traditional property law terms and considerations, thereby embedding the statute to some extent back into a familiar legal system. This helps the new concept to find acceptance and to work in practice, as the property law terms may serve as checks

⁶³ 25 U.S.C. § 3005(a)(5).

⁶⁴ Jack Trope, 'Chapter 1: The Native American Graves Protection and Repatriation Act', in American Indian Ritual Object Repatriation Foundation (ed.), *Mending the Circle: A Native American Repatriation Guide: Understanding and Implementing NAGPRA and the Official Smithsonian and other Repatriation Policies*, New York: American Indian Ritual Object Repatriation Foundation, 1996, pp. 8–18, at p. 12.

⁶⁵ See also 25 U.S.C. § 3002(a) by which NAGPRA attributes "ownership or control" of Native American cultural items which are excavated or discovered on Federal or tribal lands after 16 November 1990, to the Native Americans.

⁶⁶ 25 U.S.C. § 3002(a) (emphasis added).

⁶⁷ 25 U.S.C. § 3002(a)(1).

⁶⁸ 25 U.S.C. § 3002(a)(1)(A).

⁶⁹ 25 U.S.C. § 3002(a)(1)(B) and (C). C. T. McKeown and Sherry Hutt, 'In the Smaller Scope of Conscience: The Native American Graves Protection & Repatriation Act Twelve Years After' (2002/2003) *UCLA Journal of Environmental Law & Policy*, 21, pp. 153–212, at pp. 187–188.

and balances for resolving disputed cases. However, NAGPRA does in no way treat cultural items as financial values and lacks any obligation to compensate for repatriations or findings through excavation. It thereby abolishes good faith acquisition mechanisms and finders' fees.

3.3 NAGPRA AND HUMAN RIGHTS LAW

Even though NAGPRA stands in a property law context, the new approach is primarily influenced by human rights, or Constitutional law. The basic rationale behind NAGPRA is the insight that Native Americans need to be included in terms of humanity also with regard to respect for their dead.⁷⁰ For decades, Native American human remains were excavated, collected, and researched to scientifically prove their racial inferiority as "savages". This was often tolerated, supported, or even ordered by the government.⁷¹ In addition, lawyers revealed that the existing Federal and state law did not protect Native American graves in the same way as Western graves.⁷² This information about highly discriminatory incidents of the past and the lack of adequate protection made the United States legislator move. Under modern terms of human rights law, the treatment of Native American human remains was considered an infringement of the rights of non-discrimination.⁷³ Under the United States Constitution, the Equal Protection clauses of the Fifth and Fourteenth Amendments, and the First Amendment protecting Free Exercise of Religion served as a basis to back such human rights infringement claims.⁷⁴ With regard to human remains, NAGPRA was thus designed to address the flagrant violations of the "civil rights of America's first citizens".⁷⁵ The rationale behind the claim for protection and repatriation of sacred objects and cultural patrimony was rooted in violated civil rights or human rights connected with land taking, resettlements, reservation building, genocide, as well as encompassing assimilation programmes prohibiting ceremonies.⁷⁶

Nevertheless, NAGPRA's codification of human rights in such an extensive cultural property act is a phenomenon which is singular worldwide.⁷⁷ It relied on a broad

⁷⁰ Trope and Echo-Hawk, *supra* note 58, at p. 38.

⁷¹ See for example *ibid.*, at pp. 38–43; Gunn, *supra* note 48, at pp. 508–511.

⁷² Trope, *supra* note 64, at pp. 45–47.

⁷³ For international protection see the UN International Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195 (adopted on 21 December 1965, entered into force 4 January 1969); and UN, International Covenant on Civil and Political Rights, 999 UNTS 171 and 1057 UNTS 407; 6 ILM 368 (adopted on 16 December 1966, entered into force 23 March 1976), Articles 2 (1) and 26.

⁷⁴ Trope and Echo-Hawk, *supra* note 58, at pp. 46–50.

⁷⁵ *Ibid.*, at p. 59, citing Senator Daniel Inouye.

⁷⁶ Prohibition of Discrimination, see *supra* note 73; Prohibition of Genocide, UN, Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277 (adopted on 9 December 1948, entered into force 12 January 1951); Right of thought, Conscience, and Religion, Article 18, and minority protection, Article 27 of the International Covenant on Civil and Political Rights, *supra* note 73. For the discussion of these rights in the realm of indigenous peoples' repatriation requests, see Federico Lenzerini, 'The Trail of Broken Dreams: The Status of Indigenous Peoples in International Law', in Federico Lenzerini (ed.), *Reparations for Indigenous Peoples: International and Comparative Perspectives*, Oxford: Oxford University Press, 2008, pp. 73–116.

⁷⁷ No other country has responded, to date, to indigenous peoples' human rights claims for control over their old cultural property in a similarly encompassing legal, statutory act. Activities have accrued in other states, like Canada, with a variety of programmes and policy initiatives, yet they lack legal effect and are based upon ethical considerations or potential obligations. Catherine Bell, 'Ownership & Trade of Aboriginal Cultural

national consensus to resolve the Native Americans' claims for respect, proper treatment and repatriation of their cultural property by statutory law. Not only Native American tribes and organisations, but also numerous major associations of museums, scientists and historical societies supported the legislation.⁷⁸ NAGPRA was a compromise that was passed in the Senate by voice vote and by unanimous consent in the House of Representatives.⁷⁹ Fred A. Morris describes the compromise as follows:⁸⁰

For the Native Americans, NAGPRA presented an opportunity to redress the wrongs of past centuries perpetrated by the dominant culture and to regain control over the past so as to build a future. For the museums, the challenge to their past practices in building collections also implicated their future, for it would not only affect their research and exhibitions (i.e. which objects were to remain in their collections) but also their methods for continuing to collect data to develop further their scientific fields.

NAGPRA is also an exceptional human rights law in that it goes far beyond the usually limited scope of action on human rights standards. It is a Federal act that explicitly accomplishes human rights with positive, concrete duties imposed upon Federal agencies and museums. In addition, it provides for important tools to support the enforcement of the required activities. They include: (1) the obligation of Federal agencies and museums to initiate repatriation processes by inventorying and summarising their collections in consultation with tribal governments, Native Hawaiian organisations' officials and traditional religious leaders;⁸¹ (2) the obligation of Federal agencies and museums to publish notices of completed inventories⁸² and notices of intent to repatriate;⁸³ (3) specific procedural structures to support the processes such as the NAGPRA review committee formed by a balanced number of native and non-native members;⁸⁴ (4) penalties against museums in case of non-compliance;⁸⁵ and (5) financial grants to the amounts of about USD 2 million per year⁸⁶ for museums and tribes in order to enable them to carry out NAGPRA activities.⁸⁷

Heritage in Canada', *International Trade in Indigenous Cultural Heritage*, i-call Exploratory Workshop (University of Lucerne, Switzerland, 17-19 January 2011).

⁷⁸ McKeown and Hutt, *supra* note 69, at p. 154. Among the supporters were the American Association of Museums, Society for American Archaeology, Society of Professional Archaeologists, Archaeological Institute of America, American Anthropological Association, American Association of Physical Anthropologists, National Conference of State Historic Preservation Officers, National Trust for Historic Preservation, Preservation Action, Association on American Indian Affairs, Native American Rights Fund, and National Congress of American Indians.

⁷⁹ *Ibid.*, at p. 153.

⁸⁰ Morris A. Fred, 'Law and Identity: Negotiating Meaning in the Native American Graves Protection and Repatriation Act' (1997) *International Journal of Cultural Property*, 6 (2), pp. 199–230, at p. 203.

⁸¹ 25 U.S.C. § 3003 and 3004

⁸² 25 U.S.C. § 3003(d).

⁸³ 43 C.F.R. § 10.8(f).

⁸⁴ 25 U.S.C. § 3006.

⁸⁵ 25 U.S.C. § 3007.

⁸⁶ United States Government Accountability Office (US GAO), 'Native American Graves Protection and Repatriation Act: After Almost 20 Years, Key Federal Agencies Still Have Not Fully Complied with the Act', Report to Congressional Requesters (Doc. GAO-10-768, 2010), at p. 14.

⁸⁷ 25 U.S.C. § 3008. No funding is granted for repatriations from *Federal agencies*, and no enforcement mechanism exists to ensure *Federal agencies'* compliance except through litigation by private parties. *Ibid.*, at pp. 51, 53.

Finally, NAGPRA is a special human rights law as it explicitly integrated Native American laws and customs through direct consultations. It requires cooperation with Native American tribes and Native Hawaiian organisations to determine cultural affiliation, the right of possession, and the definition of whether an object is sacred or cultural patrimony in the sense of NAGPRA.⁸⁸ This integrative process of Native Americans in decision-making in a human rights framework is a central value of the Act. Thereby, NAGPRA does not make the mistake of simply referring to Native American customary law which is – like Western law – basically unsuitable for bridging indigenous and Western world views.⁸⁹ It, rather, goes in line with the proposal of Christoph B. Graber who has evaluated procedural solutions as the most promising for dealing with indigenous peoples that are claiming control over their cultural heritage.⁹⁰ Participatory processes correspond much better with the traditional individual rights system of Native American communities. Rather than through abstract substantive rights, such as private property rights, Native American individual rights unfold through procedural rights.⁹¹ As political power was located with families, local villages, or bands,⁹² respect for individual autonomy in these structures was deployed through everyone's right to speak and be part of collective decision-making.⁹³

3.4 ASSESSMENT

NAGPRA provides an amendment to United States cultural property law reflecting human rights and indigenous perspectives. It has confronted social and historical wrongs and legally acknowledged ongoing lives, cultures and beliefs of pre-colonial, indigenous groups, which are separate from and incompatible with Western large-scale structures and majority interests. Thereby, it takes into account a limited shift of the power of decision onto Native American tribes. Despite the expected detrimental effects of such a shift on museums, NAGPRA's process which has lasted for more than twenty years shows the contrary. Repatriations did not lead to the emptying of collections, and Native American participation in the process had a highly stimulating effect on all parties involved.

The United States Government Accountability Office Report to Congressional Requesters of July 2010 (GAO Report) inspected the NAGPRA work performed by eight key Federal agencies with substantial collections of Native American cultural property.⁹⁴ The number of historical objects of these eight agencies ranged from 5.7

⁸⁸ 25 U.S.C. § 3001 (4C and 4D)

⁸⁹ Christoph B. Graber, 'Institutionalization of Creativity in Traditional Societies and in International Trade Law', in Shubha Ghosh and Robin P. Malloy (eds), *Creativity, Law and Entrepreneurship*, Cheltenham, UK and Northampton, MA: Edward Elgar, 2011, pp. 234-263, at pp. 250-251.

⁹⁰ Ibid., at p. 251-252.

⁹¹ Carole Goldberg, 'Individual Rights and Tribal Revitalization' (2003) *Arizona State Law Journal*, 35, pp. 898-938, at p. 913.

⁹² Duane Champagne, *Notes from the Center of Turtle Island*, Lanham, Md: AltaMira Press, 2010, at p. 7.

⁹³ Goldberg, 'Individual Rights and Tribal Revitalization', supra note 91, at p. 912.

⁹⁴ Interior's Bureau of Indian Affairs (BIA), Bureau of Land Management (BLM), Bureau of Reclamation (BOR), US Fish and Wildlife Service (FWS), National Park Service (NPS), Agriculture's US Forest Service, the US Army Corps of Engineers (Corps), and the Tennessee Valley Authority (TVA). US GAO, supra note 86, at pp. 51, 53.

million⁹⁵ to 122.5 million,⁹⁶ or 589 796 cubic feet (10 701 m³)⁹⁷ each.⁹⁸ Thereof, a mere 209 626 objects have been identified as culturally affiliated NAGPRA human remains and associated funerary objects, to date. Indeed, a little less than three-quarters of them (141 027) have been repatriated.⁹⁹ These numbers are substantial, but still small in comparison with the millions of historical objects stored in the collections of the eight GAO Report agencies alone. A large undisclosed number of Native American objects remain in the collections and there is no indication that the size of the collections would not be able to cope with NAGPRA repatriations.¹⁰⁰

The reason for the limited repatriation activities under NAGPRA is the reluctance of Native American tribes to require the return of their objects. For example the Navajo Nation, the receiver of the Pectol Shields,¹⁰¹ does not generally require repatriation of human remains. They foster the predominant belief that contact with the dead may sicken or kill the contaminated person.¹⁰² The Hopi amended their encompassing repatriation policy after having evaluated chemicals on the returned objects as posing a health risk for their people. Such chemical products were applied for the better preservation of the objects.¹⁰³ More important, however, is the explanation of Wendy Teeter and Hidonee Spoonhunter, the Curator and Assistant Curator of Archaeology of the UCLA Fowler Museum in Los Angeles with an example of the Sealaska Corporation who came to investigate the Fowler Museum's collection. This native corporation, owned by over 20 000 tribal member shareholders from the Tlingit, Haida and Tsimshian people,¹⁰⁴ looked at 4000 objects of the museum with possible cultural affiliation. They came out with only a few objects in which they were really interested and only one that they were looking to pursue for repatriation. It was a Chilkat blanket which they wanted for ceremonial use.¹⁰⁵ Wendy Teeter and Hidonee Spoonhunter never experienced unreasonable or unethical requests. It is thus not only spiritual beliefs, lack of cultural reburial protocols, lack of burial sites, or lack of financial resources that hinder a more extensive NAGPRA process.¹⁰⁶ It is also a moderate reservation of the tribes and organisations vis-à-vis repatriation, or the lack of interest. This has been the case over the last 20 years of NAGPRA, and it is not expected that this tendency is going to drastically change in the future at least on the domestic level.

⁹⁵ Bureau of Indian Affairs.

⁹⁶ National Park Service.

⁹⁷ Agriculture's US Forest Service.

⁹⁸ US GAO, *supra* note 86, at p. 7.

⁹⁹ *Ibid.*, at p. 45.

¹⁰⁰ The activities vary from agency to agency. Some have already published thousands of notices of inventory completion and several notices of intent to repatriate cultural items. Others, such as the Tennessee Valley Authority, have not yet established cultural affiliations for any of their NAGPRA items. US GAO, *supra* note 86, at pp. 21, 46, 53.

¹⁰¹ See section 3.1.

¹⁰² John Holiday and Robert S. McPherson, *A Navajo Legacy: The Life and Teachings of John Holiday*, Civilization of the American Indian Series, vol. 251, Norman: University of Oklahoma Press, 2005, note 11 to pp. 235-239.

¹⁰³ Micah Loma'Omvaya, 'NAGPRA Artefact Repatriation and Pesticides Contamination: The Hopi Experience' (2001) *Collection Forum*, 17 (1-2), pp. 30-37.

¹⁰⁴ See http://www.sealaska.com/page/about_us.html.

¹⁰⁵ Wendy Teeter and Hidonee Spoonhunter, the Curator and Assistant Curator of Archaeology of the UCLA Fowler Museum in Los Angeles, interview undertaken on 16 March 2011, available with the author.

¹⁰⁶ *Ibid.*, at pp. 22 and 49-50.

Museums and agencies generally benefit from the NAGPRA process even more than the Native Americans. During the cultural affiliation process, the involved tribes contribute masses of information and knowledge about the objects, their use, cultural protocols and history, thereby substantially enhancing their value.¹⁰⁷ Many long-stored cultural objects, thought to be worthless, gain new meaning in the exchange between continuing cultures. The repatriation of human remains allows reburials that at the same time serve to re-establish a better relationship with Native American tribes. The NAGPRA process uncovers poor curating practices, along with poor historical records and documentation¹⁰⁸ and challenges archaeologist curators, museums and agency personnel to the benefit of the collections. At the same time, it puts responsibility on the Native Americans who are trying to reconnect the loose ends of their traditional lives through the evaluation of objects and establish family bonds through the burial of lost relatives.¹⁰⁹ NAGPRA induces tribes to redevelop lost cultural protocols and ceremonies for the reburial of human remains.¹¹⁰ They have to remember or re-establish cultural practices and ceremonies, as only sacred objects “for the practice of traditional Native American religions by their present day adherents” and cultural patrimony with “ongoing historical, traditional, or cultural importance” may be repatriated.¹¹¹ Bands also have to re-form as distinct groups with their own separate identity, as only recognised tribes may claim repatriations.¹¹² They have to negotiate with other tribes to sort out competing repatriation requests, as NAGPRA states that in such cases Federal agencies and museums may keep the item until the requesting parties reach agreement, or the dispute is otherwise resolved.¹¹³ And last but not least, NAGPRA encourages the development of tribal museums and cultural centres, the number of which has already surpassed 150 in the United States.¹¹⁴

In short, the NAGPRA process challenges the involved parties, but at the same time stimulates a new booming interest in American, or Native American cultural diversity. Allegedly, the upgrading of the Native American cultures even has a macroeconomic benefit. It would be worth evaluating NAGPRA’s impact on cultural self-esteem, involvement in majority activities, knowledge, health and the development of economic independence of tribes and Native American families.¹¹⁵ In comparison, the financial

¹⁰⁷ Ibid.

¹⁰⁸ US GAO, *supra* note 86, at pp. 17 and 29.

¹⁰⁹ Teeter and Spoonhunter, *supra* note 105.

¹¹⁰ US GAO, *supra* note 86, at p. 49.

¹¹¹ 25 U.S.C. § 3001(3)(C and D).

¹¹² 25 U.S.C. § 3001(7).

¹¹³ 25 U.S.C. § 3005(e). US GAO, *supra* note 86, at p. 49. In the Pectol Shields case in section 3.1 not only the Navajo Nation, but also Ute and Paiute tribes and the Southern Ute tribes presented cultural affiliation evidence. Thredy, *supra* note 49, at p. 115.

¹¹⁴ Gunn, *supra* note 48, at p. 522.

¹¹⁵ On the relationship between a flourishing cultural sector and the socioeconomic development of the Māori peoples, see Jessica C. Lai, ‘Māori Culture in the Modern World: Its Creation, Appropriation and Trade’, *University of Lucerne, Switzerland*, i-call Working Paper No. 2 (2010), at pp. 14–17, available online at http://www.unilu.ch/files/i-call_working_paper02_lai.pdf. President Obama referred to Native American health problems in his speech relating to the United States’ endorsement of UNDRIP in December 2010: “We know that Native Americans die of illnesses like diabetes, pneumonia, flu – even tuberculosis – at far higher rates than the rest of the population.” Available online at <http://www.reuters.com/article/2010/12/16/us-obama-tribes-idUSTRE6BF4QJ20101216>. On the Native American health problematic in general see The Harvard

investments for the NAGPRA process are minimal. Federal agencies spend only a fraction of their budgets on NAGPRA activities.¹¹⁶ Grants awarded to tribes and museums for repatriation projects, on average, do not exceed USD 40 000 - 60 000 each (total around USD 2 million/year).¹¹⁷

This brings us back to the stewardship theory of Carpenter et al. summarised above in section 2. NAGPRA is a working example of the stewardship theory which proves that the implementation of stewardship duties into legal property structures is possible and helps to balance worldviews and notions of property. The language used in NAGPRA notices of intent, for example, shows how such indigenous notions of stewardship may be integrated into cultural property law principles. Federal agencies and museums have to publish such notices of intent in the Federal Register before they actually repatriate culturally affiliated items.¹¹⁸ On the one hand, the notices clearly define, in Western terminology, the "owners" of the objects.¹¹⁹ On the other hand, the notices use stewardship terminology by stating for example that a certain cultural item was consecrated to a person "to care for and use the items", or to a person as the appropriate "custodian" of an item. Despite such different wording, the intention is clear and defined by NAGPRA.

Michael F. Brown has nevertheless heavily criticised the stewardship theory mainly for not considering the shrinking public domain and its protection from privatisation, for not being realistic, too vaguely defined and unable to prevent commodification.¹²⁰ However, why should we not add the bundles of stewardship rights and duties of indigenous peoples to their cultural property, if this helps to bridge language differences, comply with human rights and even enhance the value of indigenous objects and lives for the benefit of everyone? Why should we reinforce the illusion of the public domain, which stands at the discretion of the economically and militarily powerful if needed, above the valid interests of the culturally affiliated? Why should cultural affiliation not be one of the determining factors, and stewardship a guiding principle, in property law and jurisprudence if a participation mechanism costs less than the micro- and macroeconomic gain?

project on American Indian economic development, *The State of the Native Nations: Conditions under U.S. Policies of Self-Determination*, New York: Oxford University Press, 2008, at pp. 219-225.

¹¹⁶ The Bureau of Land Management, for example, with an agency budget of USD 1.3 billion in the 2010 fiscal year, reported a budget of USD 15.7 million for cultural resources for 2009. Only USD 69 286 was expended for NAGPRA compliance. US GAO, *supra* note 86, at p. 20.

¹¹⁷ *Ibid.*, at pp. 88-89.

¹¹⁸ 43 C.F.R. §10.8(f).

¹¹⁹ See the notice of intent published on 24 May 1996. The National Park Service announced in this notice the repatriation of 19 sacred Navajo objects from the Hubbell Trading Post National Historic Site to a lineal descendant of Ramon Hubbell. Federal Register, 24 May 1996, 61 (102), at p. 26 206, available online at http://www.nps.gov/nagpra/fed_notices/nagpradir/nir0031.html. See also the notice of intent published on 14 July 1997. The Laboratory of Anthropology of the Museum of Indian Arts and Culture in Santa Fe announced in this notice the repatriation of a Chiricahua Apache Gahe mask of painted wood to the Mescalero Apache tribe. Federal Register, 14 July 1997, 62 (134), at p. 37 592, available online at http://www.nps.gov/nagpra/fed_notices/nagpradir/nir0044.html.

¹²⁰ Michael F. Brown, *Who Owns Native Culture?*, Cambridge Mass.: Harvard University Press, 2003. For defending answers see Kristen A. Carpenter, Sonia K. Katyal and Angela R. Riley, 'Clarifying Cultural Property' (2010) *International Journal of Cultural Property*, 17 (3), pp. 581-598; and Rebecca Tsosie, 'International Trade in Indigenous Cultural Heritage: An Argument for Indigenous Governance of Cultural Property', *International Trade in Indigenous Cultural Heritage*, i-call Exploratory Workshop (University of Lucerne, Switzerland, 17-19 January 2011).

4. CULTURAL AFFILIATION FROM AN INTERNATIONAL PERSPECTIVE

4.1 CULTURAL AFFILIATION AS A STANDARD FOR IMPLEMENTING UNDRIP

At the international level, the issue of indigenous cultural property finds important regulations in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) adopted by the United Nations General Assembly on 13 September 2007. As well as the 143 countries originally voting for the Declaration, the United States, Canada, Australia and New Zealand – originally voting against it – officially declared endorsement of it by the end of 2010.¹²¹ UNDRIP emerged from the human rights bodies of the United Nations, mainly the former UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities and the Working Group on Indigenous Populations, in a process lasting more than two decades.¹²² The UNDRIP is in principle not legally binding. Yet UNDRIP not only had a massive impact on the academic and human rights activists' fields as well as in public awareness. Important academic opinion also assessed customary international law in UNDRIP. According to the International Law Association (ILA)¹²³ Committee on the Rights of Indigenous Peoples, for example, the UNDRIP provisions referring to the right to cultural identity as well as the right to adequate reparation and redress for suffered wrongs are internationally binding law.¹²⁴ For such law to become effective, however, an implementation process at regional, national and international level would have to follow.

In the field of indigenous cultural property – specifically cultural tangible and movable objects – UNDRIP gives distinct indications of the measures to be taken. It contains a clear statement that indigenous human remains have to be repatriated (Article 12). Furthermore, it requires access and/or repatriation of ceremonial objects (Article 12.2) and restitution of artefacts (Article 11.2), if they were taken without the indigenous peoples' free, prior and informed consent or in violation of the relevant indigenous peoples' laws, traditions and customs.¹²⁵ These provisions go beyond the hammer and anvil of private property concepts, as principally they neither require prior

¹²¹ UN Permanent Forum on Indigenous Issues, online news, available at <http://www.un.org/esa/socdev/unpfii/en/news.html>.

¹²² See for example Erica-Irene Daes, 'The UN Declaration on the Rights of Indigenous Peoples: Background and appraisal', in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford and Portland, Oregon: Hart, 2011, pp. 11–40, at pp. 11–37.

¹²³ The ILA was founded in Brussels in 1873. Its objectives under its Constitution are "the study, clarification and development of international law, both public and private, and the furtherance of international understanding and respect for international law". The ILA has consultative status, as an international non-governmental organisation, with a number of United Nations specialised agencies. See <http://www.ila-hq.org>.

¹²⁴ ILA Committee of the Rights of Indigenous Peoples, *Draft Interim Report, The Hague Conference*, 2010, at pp. 43–52. See for critical appraisal Karolina Kuprecht, 'Human Rights Aspects of Indigenous Cultural Property Repatriation', in Kerstin Odendahl and Peter Johannes Weber (eds), *Kulturgüterschutz – Kunstrecht – Kulturrecht: Festschrift für Kurt Siehr zum 75. Geburtstag aus dem Kreise des Doktoranden- und Habilitandenseminars "Kunst und Recht"*, Baden-Baden: Nomos, 2010, pp. 191–226, at pp. 220–222; and Jessica C. Lai, 'The Protection of Māori Cultural Heritage: Post-Endorsement of the UN Declaration on the Rights of Indigenous Peoples', *University of Lucerne, Switzerland*, i-call Working Paper No. 2 (2011), at pp. 19–23, available at http://www.unilu.ch/files/i-call_working_paper_2011_02_lai_maori_cultural_heritage_undrip.pdf.

¹²⁵ See Kuprecht, *supra* note 124, at pp. 212–215.

ownership nor any kind of title in the objects for indigenous peoples to access or claim for restitution of "their" objects. The reference to "their" – meaning the indigenous peoples' cultural property – leaves open what allocation concept shall apply. Just because the text refers to "their" property, this does not mean that it talks about private ownership. Especially in the context of indigenous peoples, the chances are high that a right to use or a right to custody prevails over a right of ownership.¹²⁶ In addition, the provisions do not help in assessing the particular beneficiaries, or the laws, traditions and customs to be applied.

That is where NAGPRA's cultural affiliation concept could step in and make UNDRIP's cultural property provisions practicable and enforceable in any other state. It would allow appropriate solutions along cultural lines with the avoidance of hammer and anvil thinking. However, when looking at NAGPRA and its cultural affiliation concept, one must also acknowledge the factors which helped the Act to succeed, and the clear lines and limits which the United States legislator drew in order for the Act to be passed.

4.2 FACTORS TO BE CONSIDERED WHEN IMPLEMENTING CULTURAL AFFILIATION

The cultural affiliation concept in NAGPRA helped to initiate and carry out a certain redistribution process of Native American cultural property in the United States. This is politically challenging, as redistribution processes may cause legal insecurity or – especially in case of land redistributions – even political destabilisation.¹²⁷ However, in the case of NAGPRA, the Act forms part of Federal statutory law. As a strong legal instrument it prevented legal insecurity. Furthermore, NAGPRA's redistribution process is limited to old and newly excavated tangible, movable Native American cultural property. With regard to sacred Native American objects, NAGPRA narrows the subject matter even further by requesting present-day ceremonial use.¹²⁸ The same is true for cultural patrimony, which must be of ongoing, central importance to Native American tribes in order to fall under NAGPRA.¹²⁹ The redistribution process is thus far from having a politically destabilising effect. Nevertheless, many defining and limiting factors and circumstances were necessary for NAGPRA to be passed and to succeed. They equally need to be considered when looking at the cultural affiliation concept as an implementation standard for the UNDRIP provisions.

A first important factor which helped NAGPRA to become possible is the special legal and political relationship between the Federal government and the Native American tribes in the United States. This relationship is rooted in a Supreme Court decision of 1831, in which Chief Justice Marshall described the relationship between the Federal government and the Native American tribes as that of a "ward to his guardian"

¹²⁶ Humphrey and Verdery, *supra* note 8, at p. 12.

¹²⁷ According to Daniel Fitzpatrick, in fragile states, restitution or redistribution programmes do not work and are even detrimental. This is, however, particularly the case when land rights are affected. Daniel Fitzpatrick, 'Possession, Custom and Social Order, Property Rights in a Fragile State', 2nd Annual Meeting of the Law, Property and Society Association (ALPS) (Washington D.C., 4-5 March 2011).

¹²⁸ 25 U.S.C. § 3001(3).

¹²⁹ *Ibid.*

with the Native Americans as “domestic dependent nations.”¹³⁰ This statement developed into a trust doctrine and later into a system of Federal Indian law (of which NAGPRA forms part). Furthermore, the special relationship between the Federal government and Native Americans also stands in a tradition of preferential treatment and affirmative action on behalf of Native Americans and Native American tribes¹³¹ even against possible equal rights concerns.¹³² The special relationship thus legitimised the Federal government to treat Native American repatriation claims in particular and to advocate redistribution of Native American property on their behalf. In every other country where indigenous peoples do not enjoy a similar position within the state’s structure, the enforcement of a legal redistribution of cultural property might cause more political difficulties.

Furthermore, NAGPRA took a basic but – in view of the historic conflict between state governments and indigenous peoples – not self-evident hurdle. It was passed as a legal United States Federal act regulating indigenous affairs. Whereas indigenous peoples might in general object to law and definitions that form part of Western tradition,¹³³ NAGPRA exemplifies that such law can help to bridge underlying conflicts.¹³⁴ NAGPRA could also with relative ease overcome the usually very difficult question of who should be the beneficiaries of the redistribution. NAGPRA could rely on previous definitions for Native Americans and Native American tribes in common and statutory Federal law.¹³⁵ It furthermore profited from a well-developed integration of Native American tribal realities into United States law as the result of a long-ranging social, political and legal process. Thereby, NAGPRA and especially its cultural affiliation concept benefit substantially from the large amount of work invested in refurbishing the United States’ colonial history. The important cultural knowledge and common understanding gained from that process substantially helps the NAGPRA process to work in practice. And last but not least, of great importance for NAGPRA’s success is the fact that the government runs and financially supports the process. NAGPRA is thus structurally and politically well embedded, and works due to the availability of the necessary know-how and resources.

All these factors helped NAGPRA and its cultural affiliation concept to be passed and succeed in a national context. It would be the responsibility of any country which considers the implementation of UNDRIP, and NAGPRA’s cultural affiliation concept as an example, to take such factors adequately into account.

¹³⁰ *Cherokee Nation v State of Georgia* (1831) 30 U.S. 1 (Pet.), at p. 17.

¹³¹ Carole Goldberg, ‘American Indians and Preferential Treatment’ (2001) *UCLA Law Review*, 49, pp. 943–989, at pp. 943–955.

¹³² *Ibid.*, at pp. 950–955.

¹³³ Rosemary J. Coombe, ‘The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy’ (1993) *Canadian Journal of Law and Jurisprudence*, 6 (2), pp. 249–285, at p. 275.

¹³⁴ See also Humphrey and Verdery, *supra* note 8, at pp. 13–14.

¹³⁵ Goldberg, ‘A U.S. Perspective on Protection of Indigenous Cultural Knowledge and Heritage’, *supra* note 55.

4.3 LIMITATIONS TO BE CONSIDERED WHEN IMPLEMENTING CULTURAL AFFILIATION

4.3.1 The Exclusion of Private Parties

Probably the most important limitation in NAGPRA that helped the Act to be passed is its narrow definition of the affected addressees. Only United States Federal agencies and federally funded museums have to follow NAGPRA's repatriation obligations.¹³⁶ In this sense NAGPRA explicitly states that the "Act reflects the unique relationship between the Federal Government and Indian tribes and Native Hawaiian organizations and should not be construed to establish a precedent with respect to any other individual, organization or foreign government."¹³⁷

NAGPRA thus remains in the first instance without obvious effect on private entities other than the Native American beneficiaries. Thereby, it circumvents the most difficult problem of any redistribution process which is the possible infringement of the right to private property. In the United States, this right to private property is enacted in the Fifth Amendment of the Constitution.¹³⁸ Worldwide, this right is the most frequently codified constitutional right,¹³⁹ and an important international human rights standard. The Universal Declaration of Human Rights¹⁴⁰ explicitly guarantees the right to individual property in Article 17. Also the three regional human rights standards protect the right to private property: the American Convention on Human Rights¹⁴¹ in Article 21, the African Charter on Human Rights and Peoples' Rights¹⁴² in Article 14, and the European Convention on Human Rights¹⁴³ in Article 1 of Protocol 1.¹⁴⁴

NAGPRA nevertheless has two sections which directly affect the individual property of third parties. This is the case in the section about NAGPRA items newly excavated or discovered on Federal or tribal lands after 16 November 1990.¹⁴⁵ For such

¹³⁶ 25 U.S.C. § 3001(4 and 8).

¹³⁷ 25 U.S.C. § 3010.

¹³⁸ The Fifth Amendment protects private property from being taken for public use without just compensation. The Constitution of the United States, Amendment 5 (passed 25 September 1791, ratified 15 December 1791). For possible Fifth Amendment implications of 25 U.S.C. § 3002 in cases of inadvertent discovery of NAGPRA on reservation fee lands see Ralph W. Johnson and Sharon I. Haensly, 'Fifth Amendment Takings Implications of the 1990 Native American Graves Protection and Repatriation Act' (1992) *Arizona State Law Journal*, 24, pp. 151–173.

¹³⁹ This was the outcome of a compilation of observations and proposals and a catalogue of the relevant provisions in national constitutions used by the Economic and Social Council to draft the Universal Declaration of Human Rights, (UN Doc. E/CN.4/AC.1/3/Add.1, 1947), cited by van Banning, *supra* note 13, at p. 137.

¹⁴⁰ UN GA Res. 217A (III) (UN Doc. A/810) (adopted on 10 December 1948).

¹⁴¹ OAS Treaty Series No. 36; 1144 UNTS 123 (adopted on 22 November 1969, entered into force 18 July 1978); reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).

¹⁴² OAU Doc. CAB/LEG/67/3 rev. 5; 21 ILM 58 (adopted on 27 June 1981, entered into force 21 October 1986).

¹⁴³ CETS No. 005 (adopted on 4 November 1950, entered into force 3 September 1953).

¹⁴⁴ CETS No. 009 (adopted on 20 March 1952, entered into force 18 May 1954). See for details van Banning, *supra* note 13, at pp. 57–79.

¹⁴⁵ 25 U.S.C. § 3002.

objects, NAGPRA – by law – imposes “native ownership”¹⁴⁶ upon the Native Americans.¹⁴⁷ As a consequence, it entitles the so-defined Native American owners to civil property claims against any individual finder or future possessor of such objects, irrespective of private property finder’s law. NAGPRA itself and the cultural affiliation prong are decisive.¹⁴⁸

The other NAGPRA section that goes beyond the Federal and Native American relationship is 18 U.S.C. § 1170. This section penalises illegal trafficking in Native American objects. It includes the knowing sale, purchase, use for profit, or transportation for sale or profit of human remains¹⁴⁹ and cultural items.¹⁵⁰ With regard to human remains, the clause is not limited to any particular age of human remains, or to objects previously interred in Federal or tribal lands.¹⁵¹ Thus, anybody claiming or paying money for any Native American human remains within or outside the United States territory runs the risk of committing a NAGPRA crime. The effect is that human remains of Native Americans effectively have become *res extra commercium*. With regard to cultural items, trafficking is penalised if they were obtained in violation of NAGPRA’s ownership or permit provisions¹⁵² or in violation of NAGPRA’s repatriation provisions (by removing an object from the repatriation process for example).¹⁵³ In both instances, a criminal conviction can be avoided if the offender proves a right of possession to the object which is, however, subject to the voluntary consent of the Native American individual or group with authority to alienate the object.¹⁵⁴ This application of NAGPRA on private persons has been challenged in court. However, in *US v Kramer*,¹⁵⁵ the Court of Appeals for the Tenth Circuit confirmed the applicability to individuals as follows:¹⁵⁶

It is true that Congress enacted NAGPRA to protect Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony, and to repatriate such objects currently held or controlled by federal agencies and museums. ... However, “to give teeth to this statutory mission,” section 4 of NAGPRA amended Title 18 of the United States Code to criminalize trafficking in Native American human remains and cultural items, in an effort to eliminate the profit incentive perceived to be a motivating force behind the plundering of such items... It is clear that the criminal provision, 18 U.S.C. § 1170(b), to which defendant pleaded guilty, encompasses violations by individual traders such as Kramer.

¹⁴⁶ See Michael Anton, *Rechtshandbuch Kulturgüterschutz und Kunstrestitutionsrecht*, Berlin: de Gruyter, 2010. The author compares native ownership to *in lege* state ownership in cultural property.

¹⁴⁷ See section 3.2.

¹⁴⁸ 25 U.S.C. § 3002(a). See *supra* section 3.2.

¹⁴⁹ 18 U.S.C. § 1170(a).

¹⁵⁰ 18 U.S.C. § 1170(b).

¹⁵¹ McKeown and Hutt, *supra* note 69, at p. 207; and Roberto Iraola, ‘A Primer on the Criminal Penalty Provisions of the Native American Graves Protection and Repatriation Act’ (2003-2004) *American Indian Law Review*, 28, pp. 431–445, at p. 435.

¹⁵² 25 U.S.C. § 3002.

¹⁵³ 25 U.S.C. § 3005. McKeown and Hutt, *supra* note 69, at p. 208; and Iraola, *supra* note 151, at pp. 435–437.

¹⁵⁴ 25 U.S.C. § 3001(3). Iraola, *supra* note 151, at p. 436; and Trope and Echo-Hawk, *supra* note 58, at p. 73.

¹⁵⁵ *US v Kramer* (1999) 168 F 3d 1196 (C.A.10, N.M.).

¹⁵⁶ *Ibid.*, at pp. 1201-1202.

Apart from such specific effects of NAGPRA on Native American cultural property in possession of private persons, NAGPRA leaves most cases with regard to Native American cultural property outside the possession of Federal agencies and museums unresolved. UNDRIP's provisions, however, principally require more encompassing solutions.

4.3.2 The Exclusion of International Repatriation Claims

NAGPRA also limits its field of application to domestic issues. It does not consider international repatriation claims of Native Americans for their cultural property. As stated above, NAGPRA explicitly provides that it should not be construed to establish a precedent with respect to foreign governments.¹⁵⁷ Thus, the Act avoids extra-territorial effect and any conflict with Native American cultural property state possessions outside the United States. This is in line with the international principle that states respect each other's territoriality and the property rights attached thereto. The Draft Declaration on Rights and Duties of States of 1949¹⁵⁸ formulated such territorial property rights by ensuring the right of every state to "exercise jurisdiction over its territory and over all persons and things therein" (Article 2). This is deployed in the genuine universal juridical freedom of states to use and exploit their territories whenever they consider it desirable for their progress and economic development.¹⁵⁹

However, NAGPRA could have at least empowered and obliged the Federal government to work at the international level towards solutions for Native American repatriation claims. One may even raise the question as to whether the fiduciary duty of the Federal government vis-à-vis the Native American tribes, which emanates from their special relationship,¹⁶⁰ would not require such activity from the Federal government even without an explicit legal provision.

5. CONCLUSION

Private property law as originally developed in Roman law may not provide adequate solutions for indigenous peoples' cultural property claims. The latest international regulations, most importantly UNDRIP, require going beyond property thinking to better respect the interests of indigenous peoples to control or access their cultural property.

NAGPRA is a pioneer in implementing such requests for tangible, movable Native American cultural property, in the relationship between the United States Federal government and Native American tribes. It innovated the concept of cultural affiliation, which turned out to be a successful instrument, stimulating a vibrant exchange between

¹⁵⁷ 25 U.S.C. § 3010; see *supra* section 4.3.1.

¹⁵⁸ Submitted to the General Assembly as a part of the Commission's general report, Annex to General Assembly Res. 375 (IV) (6 December 1949), in *Yearbook of the International Law Commission* (1949), available online at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/2_1_1949.pdf.

¹⁵⁹ General Assembly Res. 545 (VI) (5 February 1952); Res. 626 (VII) (21 December 1952); Res. 1314 (XIII) (12 December 1958); Res. 1515 (XV) (15 December 1960); Res. 1803 (XVII) (14 December 1962); and Res. 3281 (XXIX) (12 December 1974).

¹⁶⁰ See *supra* section 4.2.

scientists, museums and tribes, adding value to many collections and objects. NAGPRA's cultural affiliation concept is a working example from which cultural property lawyers can learn that the property law principle of looking into the act of acquisition is not the only just solution for allocating cultural property. The cultural affiliation prong bridges different property concepts that are based on very different worldviews and it better complies with human rights standards than Western private property law principles. It serves as an example for countries that are ready to implement UNDRIP's provisions on tangible, movable cultural property of indigenous peoples. However, when implementing NAGPRA's cultural affiliation concept, one not only has to consider the political and legal factors that helped NAGPRA to be passed and to succeed, it is also important to acknowledge the limits to the cultural affiliation concept in NAGPRA, which, however, do not comply with the provisions of UNDRIP.